FILED
DEC 1 5 1992
CLERK

No. 92-516

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORP., PETITIONER

v.

DAKOTA GASIFICATION CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ALLEN L. LEAR
LACY R. HARWELL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly interpreted several contracts to entitle the Department of Energy and its successor-in-interest, the Dakota Gasification Company, to litigate rather than arbitrate their commercial disputes with four gas pipeline companies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	17

TABLE OF AUTHORITIES

Cases:

ANR Gasification Properties Co. v. *United States*, 484 U.S. 924 (1987)	4
AT&T Technologies, Inc. v. *Communications Workers*, 475 U.S. 643 (1986)	13
Ballay v. *Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989)	15
Bechtel Corp. v. *Local 215, Laborers' Int'l Union*, 544 F.2d 1207 (3d Cir. 1976)	11
Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988)	9
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985)	6, 13, 14, 16
Gilmer v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991)	16
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)	7, 16
Moses H. Cone Memorial Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983)	6, 16
Neal v. *Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990)	15
Patten Securities Corp. v. *Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987)	13, 14
Perry v. *Thomas*, 482 U.S. 483 (1987)	16
Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)	6-7

Cases—Continued: Page

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 16
St. Paul Fire & Marine Ins. Co. v. *Tennefos Constr. Co.*, 396 F.2d 623 (8th Cir. 1968) 5
Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 6, 16
Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 16
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 10, 16
The Bremen v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) .. 11
Travel Consultants, Inc. v. *Travel Management Corp.*, 367 F.2d 334 (D.C. Cir. 1966) 15
United States v. *Great Plains Gasification Assocs.*, 813 F.2d 193 (8th Cir. 1987) 4, 11
United States v. *Great Plains Gasification Assocs.*, 819 F.2d 831 (8th Cir. 1987) 4, 11
Volt Information Sciences, Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 6, 13, 16

Statutes and rule:

Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (5 U.S.C. 581 *et seq.*) 9
5 U.S.C. 585 9
Federal Arbitration Act, 9 U.S.C. 1 *et seq.*:
9 U.S.C. 2 6
9 U.S.C. 4 6

Miscellaneous:

32 Comp. Gen. 333 (1953) 9
33 Op. Atty. Gen. 160 (1922) 9

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-516

TRANSCONTINENTAL GAS PIPE LINE CORP., PETITIONER

v.

DAKOTA GASIFICATION CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 964 F.2d 732. The opinion of the district court (Pet. App. B1-B6) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A14-A15) was entered on May 4, 1992. A petition for rehearing was denied on June 25, 1992. Pet. App. E. The petition for a writ of certiorari was filed on September 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the early 1980s, a partnership called Great Plains Gasification Associates (Great Plains) built a factory in North Dakota to extract synthetic natural gas from lignite coal. Great Plains was composed of four pipeline companies (the Pipelines)—petitioner Transcontinental Gas Pipe Line Corporation (Transco), Tennessee Gas Pipeline Company (Tennessee), ANR Pipeline Company (ANR), and Natural Gas Pipeline Company of America (Natural)—as well as an additional investor.[1] In addition to funds provided by the partners, construction of the plant was financed by a $1.5 billion loan guaranteed by the Department of Energy (DOE) and secured by a mortgage on the real and personal property of the project. Pet. App. A2, C2.

Prior to completion of the plant, Great Plains entered into a Gas Purchase Agreement with each Pipeline. See Pet. App. Fi-F25. Great Plains agreed to sell, and each Pipeline agreed to purchase, a stated percentage of the total synthetic gas output of the gasification plant for 25 years at formula prices. *Id.* at F3-F4. Each Gas Purchase Agreement provided that "[a]ny dispute between the parties arising out of this Agreement * * * shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration." *Id.* at F24.

Contemporaneously with the execution of the Gas Purchase Agreements, each Pipeline entered into a Pipeline Affiliates Agreement with DOE. Pet. App. H1-H10. Under the Pipeline Affiliates Agreement, which

---

[1] Tennessee, ANR, and Natural have filed a brief in support of Transco's petition for certiorari. The fifth partner is not involved in this litigation.

was a condition precedent to DOE's loan guarantee, each Pipeline agreed to perform all of its material obligations under the Gas Purchase Agreement to which it was a party, and to reinstate its respective Gas Purchase Agreement with the Secretary of Energy or his designee in case Great Plains defaulted on the loan and DOE assumed operation of the project. *Id.* at H2. The Pipelines agreed to submit to the jurisdiction of designated federal courts, and to the application of federal law, in any suit brought "to enforce the rights of the Secretary" under the Pipeline Affiliates Agreement. *Id.* at H9-H10.

2. On August 1, 1985, Great Plains defaulted on its obligation and terminated its participation in the gasification plant. DOE honored its loan guarantee and assumed operation of the project. The Secretary of Energy was substituted for Great Plains as the Seller under the Gas Purchase Agreements upon their reinstatement pursuant to the Pipeline Affiliates Agreement. Pet. App. A3-A4.

After Great Plains's default, and in reaction to a continuing downward trend in gas prices, Natural filed suits challenging the validity of the Gas Purchase Agreements in Illinois state court and the United States District Court for the District of Columbia. The United States subsequently filed a complaint in the United States District Court for the District of North Dakota seeking, in part, foreclosure on its mortgage on the gasification plant and a declaration that the Gas Purchase Agreements were valid and enforceable. The two lawsuits filed by Natural were consolidated with the government's action. See Gov't C.A. Br. 7-10.

On January 14, 1986, the district court entered summary judgment in favor of the United States, upholding the enforceability of the Gas Purchase Agreements and

granting the United States its right to foreclose on the mortgage. Resp. Br. in Supp. App. 1a-20a. The Eighth Circuit affirmed the district court's summary judgment on the issue of foreclosure, *United States* v. *Great Plains Gasification Assocs.*, 813 F.2d 193 (1987), and on the issue of the validity and enforceability of the Gas Purchase Agreements, *United States* v. *Great Plains Gasification Assocs.*, 819 F.2d 831 (1987). This Court denied the Pipelines' petition for certiorari. *A N R Gasification Properties Co.* v. *United States*, 484 U.S. 924 (1987).

3. On October 7, 1988, Dakota Gasification Company (Dakota) entered into an Asset Purchase Agreement with DOE, pursuant to which DOE transferred to Dakota all of the real and personal property of the plant, including DOE's rights under the four reinstated Gas Purchase Agreements, in exchange for $85 million in cash, plus $1.6 billion to be generated by plant revenues over the next 18 years. Pet. App. A4; C.A. App. 263-477. Dakota assumed operation of the plant, and continued the production and sale of the synthetic natural gas consistent with its obligations as Seller under the four Gas Purchase Agreements. Disputes soon arose with respect to the Pipelines' contractual obligations under the Gas Purchase Agreements. See Pet. App. A5.

4. Dakota filed suit in the United States District Court for the District of North Dakota to determine, once again, the parties' rights and obligations under the Gas Purchase Agreements. The United States successfully moved to intervene in the suit because, under the Asset Purchase Agreement, it has a substantial financial stake in the plant's revenues and profitability. Pet. App. A5 n.6.

Each of the Pipelines sought arbitration of the issues raised by Dakota's action, and moved for dismissal on the ground that the arbitration clauses precluded litigation of those issues. On January 11, 1991, the district court granted summary judgment in favor of the defendants, concluding that the arbitration clauses in the Gas Purchase Agreements were valid and binding. Pet. App. B4-B5. Each Pipeline then commenced separate arbitration proceedings, subjecting Dakota to arbitration in four different States.

5. The court of appeals reversed. The court began by observing the common-law rule that "the Gas Purchase Agreements and the Pipeline Affiliates Agreement 'should be read together as they represent successive steps which were taken to accomplish a single purpose.'" Pet. App. A6 (quoting *St. Paul Fire & Marine Ins. Co.* v. *Tennefos Constr. Co.*, 396 F.2d 623, 628 (8th Cir. 1968)). Construing the contracts together, the court held that "under the facts of this case, * * * if the Secretary or its successor-in-interest has a dispute with the Pipelines concerning the Gas Purchase Agreements, the former parties can successfully demand that the dispute be litigated in the designated federal courts." Pet. App. A7. Judge Magill dissented. *Id.* at A9-A13.

ARGUMENT

This case does not present any broad legal issues of relevance to other cases. Instead, this case turns on the proper construction of the terms of a contract between petitioner and the Department of Energy. The court of appeals correctly interpreted those terms. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Contrary to petitioner's assertion (see, *e.g.*, Pet. 9), the decision below does not conflict with the "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), or any decision of this Court. Nothing in that policy requires federal courts to conclude that parties have agreed to arbitrate their disputes when the terms of the contract provide otherwise. The Secretary did not—and could not—agree to arbitrate any disputes with the Pipelines.

a. The purpose of the Federal Arbitration Act is simply "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985), and to place such agreements "upon the same footing as other contracts," *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). To that end, the Act declares that a written agreement to arbitrate in any contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, and provides a remedy for a party seeking to compel arbitration, 9 U.S.C. 4.

As this Court recently stated, however, Section 4 of the Act "does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" *Volt Information Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 474-475 (1989) (quoting 9 U.S.C. 4). Indeed, the Act only "directs the federal court to order arbitration *once it is satisfied that an agreement for arbitration has been made* and has not been honored." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395,

400 (1967) (emphasis added). Arbitrability is a matter of contract, and "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

b. There are two contracts directly at issue in this case: The Gas Purchase Agreements and the Pipeline Affiliates Agreement. Pet. App. A5.[2] The court of appeals correctly observed that the contracts were executed contemporaneously and, therefore, concluded that they should be interpreted collectively. *Id.* at A6. Indeed, petitioner concedes that the court correctly construed the agreements "together as a single contractual undertaking." Pet. 11. Reading the two contracts in this fashion indicates that the Pipelines contracted to arbitrate claims under the original Gas Purchase Agreements they negotiated with Great Plains, and to litigate claims with the Secretary in the event Great Plains defaulted.[3] It is well settled that parties may agree to arbitrate some claims and litigate others. See, *e.g.*, *Mitsubishi*, 473 U.S. at 628. This interpretation of

---

[2] Great Plains also entered into Synthetic Gas Transportation Agreements with each Pipeline. See Pet. App. G1-G13. The court of appeals did not discuss these agreements, and petitioner does not appear to rely on them in this Court. The other Pipelines recognize that the interpretation of the arbitration clauses in the Transportation Agreements "is not relevant to this petition." Resp. Br. in Supp. 2 n.1.

[3] Dakota succeeded to the United States' interests in 1988. The court of appeals correctly concluded that because Dakota stands in the shoes of the Secretary for purposes of these contracts, it is no more bound by the original arbitration clauses than was the Secretary. Pet. App. A8. Petitioner does not challenge that determination in this Court.

the agreements is firmly grounded in the text of the documents and the surrounding circumstances.

(i.) Only the Gas Purchase Agreements contained an arbitration provision.[4] The Secretary was not a party to those agreements, however. In contrast, the Pipeline Affiliates Agreement—the sole contract to which the Secretary was a party—addresses the contingency of a relationship between the Pipelines and the United States Department of Energy, which would become the Seller in the event of default. This Agreement provides for litigation, not arbitration. It would defeat the very purpose of this contract to permit arbitration in this case.

The Pipeline Affiliates Agreement contains several provisions designed to protect the interests of the United States, and was explicitly made a condition precedent to the government's guarantee of the $1.5 billion loan to build the gasification plant. Pet. App. H1. This Agreement requires the Pipelines to reinstate the Gas Purchase Agreements with the government following default by Great Plains, and contains the Pipelines' promise to perform their obligations under the Gas Purchase Agreements. *Id.* at H2. It provides that the Pipelines' covenants continue until the indebtedness is paid and states that the rights of the Secretary inure to the benefit of successors in interest, so that DOE need not be the long-term operator of the plant. *Id.* at H8-H9. To ensure protection of these federal interests in the event of a default, the Agreement provides that the rela-

---

[4] Because the government had assumed operation of the project before the commencement of this litigation, the court of appeals did not decide whether the arbitration clauses contained in the Gas Purchase Agreements would have been enforceable as between the Pipelines and Great Plains had Great Plains not defaulted.

tionship between the Pipelines and the Secretary is governed by federal law and requires the Pipelines to consent to the jurisdiction of specific federal courts to resolve disputes. *Id.* at H6 ("the rights and obligations of the parties shall be governed by and construed and interpreted in accordance with the federal laws of the United States"); *id.* at H9-H10 ("[t]he parties hereto consent to the jurisdiction in any United States District Court located in the District of Columbia or North Dakota, in connection with any suit to enforce the rights of the Secretary hereunder").

(ii.) The conclusion that these provisions were intended to require litigation of all disputes between the Secretary (or his successor in interest) and the Pipelines is further confirmed by the fact that the Secretary lacked legal authority to agree to binding arbitration. Absent specific statutory authority, DOE could not, as a branch of the federal government, submit controversies to binding arbitration or allow private parties to decide disputes concerning the United States. See, *e.g.*, 32 Comp. Gen. 333 (1953); 33 Op. Atty. Gen. 160 (1922). Although the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, codified at 5 U.S.C. 581 *et seq.*, generally leaves agencies free to agree to arbitration (see 5 U.S.C. 585), it does not apply here because the Pipeline Affiliates Agreement predates the November 15, 1990 date of enactment. See generally *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). Therefore, although the arbitration clause could serve the original relationship between the Pipelines and Great Plains, the Secretary's relationship with the Pipelines could only be governed by the jurisdictional clauses contained in the Pipeline Affiliates Agreement.

(iii.) The court of appeals therefore correctly concluded that the arbitration provisions in the original Gas Purchase Agreements were superseded by the federal litigation clauses in the Pipeline Affiliates Agreement after the default.[5] When Great Plains defaulted on its obligations, the original Gas Purchase Agreements terminated. After the government exercised its rights under the mortgage, the Gas Purchase Agreements were reinstated pursuant to and subject to the terms of the Pipeline Affiliates Agreement. By incorporating the basic production, pricing and delivery terms of the original Gas Purchase Agreements into the provisions of the Pipeline Affiliates Agreement, the parties were bound by a modified contractual arrangement.[6]

The different dispute resolution procedures thus reflected the new commercial relationship resulting from the accession of the United States Government to the

---

[5] The Pipelines supporting petitioner criticize the court of appeals for reversing the district court's contrary interpretation of the contracts. Resp. Br. in Supp. 3 n.2. It is well settled, however, that the interpretation of contracts is a question of law reviewed de novo by the appellate court. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.7 (1984) (undertaking independent evaluation of scope of arbitration clause).

[6] The argument (Resp. Br. in Supp. 7 (emphasis omitted)) that the arbitration clause remains in effect because the Gas Purchase Agreements were to be reinstated "on the same terms," and arbitration is a "term," ignores the context of the cited provision. The contract provides that each Pipeline "will continue to *take or pay for gas* as provided [in the Gas Purchase Agreements] on the same terms as were in effect prior to such termination and reinstatement." Pet. App. H2 (emphasis added). The clear import is that the complex pricing, measurement, and delivery provisions of the Gas Purchase Agreements (see *id.* at F3-F18) would remain in effect following reinstatement.

position formerly held by Great Plains. In light of the pivotal role played by DOE in financing the plant, and the concessions made by the Pipelines in the Pipeline Affiliates Agreement, the court of appeals correctly found that the parties intended to provide the Secretary the prerogative to litigate disputes in federal court upon the default of Great Plains. Pet. App. A8. The jurisdictional provisions of the Pipeline Affiliates Agreement were bargained over and agreed to by the Pipelines, and form substantive terms of the contract to which the courts must give effect. See generally *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (recognizing importance of bargained-for forum selection clauses). Because they evidence the intention of the parties to provide the Secretary with the right to litigate disputes in federal court, they replaced inconsistent terms in the Gas Purchase Agreements, including the arbitration clauses. See *Bechtel Corp.* v. *Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1213 (3d Cir. 1976) (language of second contract containing an inconsistent dispute resolution clause prevails over clause in earlier agreement).

c. Petitioner concedes (Pet. 12) that the Secretary could bring an action in federal court to enforce the Pipelines' promise to reinstate the Gas Purchase Agreements, but maintains that this particular dispute falls outside the bounds of the jurisdictional clauses. Petitioner's construction is not supported by the parties' course of dealing or the language of the contract. Following Great Plains's default, the Pipelines litigated the enforceability of the Gas Purchase Agreements in a suit brought by the United States pursuant to the jurisdictional clauses in the Pipeline Affiliates Agreement. *United States* v. *Great Plains Gasification Assocs.*, *supra*. No claim was made that the dispute was not prop-

erly in federal court, reflecting the parties' mutual understanding that disputes with DOE under the reinstated Gas Purchase Agreements were to be litigated rather than arbitrated. Like disputes over reinstatement and enforceability, disputes over performance are properly litigated when the Secretary is a party.

Indeed, petitioner concedes that "the Secretary has the right to litigate in the specified federal courts those claims arising from the Pipelines' breach of *any* covenant * * * contained in the Pipeline Affiliates Agreement." Pet. 12 (emphasis added) (quoting Pet. App. A10 (Magill, J., dissenting)). In the Pipeline Affiliates Agreement, each Pipeline "covenant[ed]" to "perform all of its material obligations under the Gas Purchase Agreement to which it is a party." *Id.* at H2. The present litigation is nothing more than a dispute over the Pipelines' performance of their obligations under the Gas Purchase Agreements. *Id.* at A5 n.7 ("In its complaint, Dakota sought a ruling outlining the Pipelines' purchase obligations under the Gas Purchase Agreements."). The court of appeals therefore correctly determined that "under the Pipeline Affiliates Agreement, the Secretary contracted for the prerogative to litigate disputes affecting its rights (which includes the Gas Purchase Agreement obligations of the Pipelines) in designated federal courts." *Id.* at A8.[7]

---

[7] Petitioner's complaint (Pet. 15; see also Resp. Br. in Supp. 4-7) that the court's ruling will disrupt arbitration proceedings currently proceeding pursuant to an order of a district court in Texas is misplaced. Even under the narrow reading of the Pipeline Affiliates Agreement urged by petitioner, the only courts with jurisdiction over an action to compel arbitration would be the district courts of North Dakota and the District of Columbia.

d. Where, as here, the contracts reveal that the party seeking to compel arbitration "had no such right in the first place," *Volt*, 489 U.S. at 475, such a finding does not offend the Act's objectives. See *id.* at 479 ("Arbitration under the Act is a matter of consent, not coercion."); *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). While courts must "rigorously enforce agreements to arbitrate," *Dean Witter*, 470 U.S. at 221, there must be such an agreement before it can be enforced. By enforcing the parties' agreement here according to its terms, the court of appeals merely "recognized that the [Act] does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478.

2. Contrary to petitioner's assertion (Pet. 10-11), the decision in this case does not conflict with *Patten Securities Corp.* v. *Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987).

In *Patten Securities*, the Third Circuit was faced with a conflict between a forum selection clause in a securities underwriting agreement and a contemporaneous obligation imposed by the National Association of Securities Dealers (NASD) upon its members to submit all their disputes with customers to arbitration. See 819 F.2d at 406 ("Patten is compelled by its NASD membership to submit *even absent a specific contractual arbitration undertaking.*") (emphasis added). The starting point of the Third Circuit's analysis was that "absent a waiver Patten must submit to Diamond's arbitration demand." *Ibid.* The court merely held that an ambiguous forum-selection clause did not serve to waive the cus-

tomer's preexisting right to arbitration, because the federal preference for arbitration resolves the ambiguity.

Far from being "analytically indistinguishable" (Pet. 10), this case presents exactly the opposite situation. The Secretary had no preexisting obligation to arbitrate any dispute. Moreover, the Secretary never agreed—indeed, could not have agreed (see pages 9-10, *supra*)—to arbitration; on the contrary, the Pipelines agreed to litigate disputes with the Secretary. The "tiebreaker" function of the Act never comes into play here.[8] In contrast to the situation presented in *Patten Securities*, there is no need to reconcile a forum selection clause with an arbitration obligation because here there is no obligation to arbitrate. See *Dean Witter*, 470 U.S. at 219 ("The Act * * * does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.").

---

[8] In his dissent below, Judge Magill found that the interpretation of the two contracts was ambiguous, and would have resolved the ambiguity in favor of the Pipelines. Pet. App. A12-A13. The majority, however, found the particular contracts involved here unambiguously to grant the Secretary the right to litigate. *Id.* at A8. The court's interpretation of the unusual agreements in this case rests squarely upon the conditions imposed by the federal government for its guarantee of the $1.5 billion loan to build the gasification plant, a unique and complex commercial venture. See *ibid.* (rejecting Pipelines' arguments because they "ignore the conditions under which the Secretary of Energy agreed to guarantee the financing for the gasification plant"). Given the peculiar facts of this case, further review of the contracts by this Court is not warranted. For the same reason, petitioner errs in asserting that the decision below "will have important and unfortunate consequences for arbitration as an alternative means of dispute resolution." Pet. 16.

The facts of the two cases are also very different. *Patten Securities* involved a relatively simple securities transaction and the resulting dispute between an underwriter and its customer. The Third Circuit did not confront the introduction of important federal interests into a commercial transaction as a result of default under massive federal financing. The court of appeals in this case held that in order to protect those interests, and as a condition to the issuance of the loan guarantee, DOE demanded and received the right to litigate its disputes in federal court in the event of a default. Pet. App. A7. *Patten Securities* does not undermine or conflict with that holding in any way; indeed, the Third Circuit could have no quarrel with the decision below because it merely enforced the parties' agreements according to their terms. See, *e.g.*, *Ballay* v. *Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 733-734 (3d Cir. 1989) (affirming order denying motion to compel arbitration where contract evidenced intention not to be bound by arbitration clause).[9]

3. There is no merit to petitioner's claim that "because of the well-established precedents of this Court

---

[9] Two other cases cited by petitioner (Pet. 11) as conflicting "in principle" with the decision below are inapposite. In *Neal* v. *Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990), and *Travel Consultants, Inc.* v. *Travel Management Corp.*, 367 F.2d 334 (D.C. Cir. 1966), the courts did, as petitioner asserts, hold that "contracting parties must arbitrate all disputes arising under agreements in which covenants to arbitrate appear, even if other related and simultaneously executed agreements contain no such covenants." Pet. 11. The parties in those cases, however, unlike the Secretary here, were parties to the contracts containing the arbitration clauses; thus the courts reasonably held that they were bound to arbitrate disputes arising under them. The Secretary, not having agreed to arbitration, has no such obligation.

regarding the presumption of enforceability of arbitration agreements under the Act, this case is ripe for summary reversal." Pet. 4. Petitioner cites ten decisions of this Court in support of its argument that the decision below conflicts with the strong federal policy favoring arbitration. See Pet. iv. In every one of those cases, however, the parties had *entered into* a contract containing an arbitration clause; the question was the enforceability of the agreement or the arbitrability of a specific dispute.[10] Here, the Secretary simply was not a party to any contract containing an arbitration clause. As demonstrated above, the court correctly construed the contracts in this case to give the Secretary the right to litigate in federal court. "[T]he [Act] does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478.

---

[10] See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1650-1651 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 478 (1989); *Volt*, 489 U.S. at 470; *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 223 (1987); *Mitsubishi*, 473 U.S. at 617; *Dean Witter*, 470 U.S. at 215; *Southland Corp.*, 465 U.S. at 4; *Moses H. Cone*, 460 U.S. at 4-5; *Scherk*, 417 U.S. at 508; cf. *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) (leaving this "straightforward issue of contract interpretation" to the lower court on remand).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ALLEN L. LEAR
LACY R. HARWELL
Attorneys

DECEMBER 1992